No. 255.

By J. W. Bryan, Cor

The Bobbs-Clarke Company, Printers.

FILED
FEB 8 1902
JAMES H. McKENNEY,
Clerk.

Filed Feb. 8, 1902.

No. 255.

Supreme Court of the United States.

OCTOBER TERM, 1901.

The City of Covington and John N. Middendorf, Assessor of the City of Covington, *Appellants,*

vs.

The First National Bank of Covington, Kentucky, *Appellee.*

BRIEF FOR APPELLEE, THE FIRST NATIONAL BANK OF COVINGTON, KY.

JAMES W. BRYAN,
Solicitor for Appellee.

The Robert Clarke Company, Printers. January, 1902.

No. 255.

Supreme Court of the United States.

OCTOBER TERM, 1901.

The City of Covington and John N. Middendorf, Assessor of the City of Covington, *Appellants,*

vs.

The First National Bank of Covington, Kentucky, *Appellee.*

BRIEF FOR APPELLEE, THE FIRST NATIONAL BANK OF COVINGTON, KY.

STATEMENT OF CASE.

The United States Circuit Court for the District of Kentucky, by its judgment rendered on December 17, 1900, perpetually enjoined the City of Covington, Kentucky, a city of the second class in that state, and its city assessor, from making any levy or assessment of taxes on the shares of the capital stock of the First National Bank of Covington, Kentucky, for any time prior to March 21, 1900, and further permitting them to assess said shares for any proper period after said date, enjoined the collection of the tax so assessed until it should be made to appear whether the taxes so

assessed were at a higher rate than permitted by law, and retained control of the case for the purpose of adjudicating and settling any question that might arise on such future assessments, and from that judgment said city and its assessor have prosecuted this appeal.

The bank on July 23, 1900, filed in that court its bill in equity against the city and its assessor, which it, by permission, amended on August 14, 1900, asking that the city and its officers be enjoined from assessing, or attempting to collect tax on the shares of capital stock of the bank for any of the years 1893 to 1900, both inclusive, or from arresting the bank's president or cashier, as they were threatening to do, for not listing for taxation the said shares of stock, and that it be adjudged that the shares of the bank's capital stock were not subject to taxation by the city until November, 17, 1904.

Every allegation of fact made by the bill and the amendment stands *admitted to be true.* Appellants appeared and demurred, and that being overruled they could not, and did not, attempt to controvert any of the allegations by appellee made.

It is admitted by the record:

Appellee is a national bank, incorporated November 17, 1884, under the National Bank Act of Congress, for a term of twenty years, its corporate existence terminating therefore on November 17, 1904, and it is and has, since its incorporation, been located in Covington, Ky.

In December, 1886, the Legislature of Kentucky passed an act, called the "Hewitt Law," for the taxation of all banks in Kentucky, which provided for a contract to be entered into by and between the State of Kentucky upon the one part and the banks, state and national, upon the other, providing:

> "That shares of stock in state and national banks . . . shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one

hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation as is assessed upon real estate, which shall be in *full of all tax, state, county and municipal.*"

Said act further provided:

"That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of said act provided:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right, under the acts of congress or under the charters of the state banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky, shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its *shares of stock* shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." (For the act complete see Appendix to this brief.)

The appellee, on the 22d day of June, 1887, within the time and as by said act provided, filed with the governor of the State of Kentucky its agreement and acceptance thereunder. The cashier of appellee has, on the 1st day of July of each and every year since then, including the year 1900, filed with the auditor of public accounts the statement required by the second section of said act, and appellee

has paid the taxes as therein provided of seventy-five cents on each share of stock, etc., to the State of Kentucky for each and every of said years, including *the year* 1900, *which tax has been accepted and retained by the State of Kentucky*. It has also each year paid to the appellant, City of Covington, taxes for municipal purposes assessed by the City of Covington on its banking building.

The State of Kentucky, under the constitution in force in 1886, had the right to enter into this contract with the banks. A new constitution for Kentucky was adopted on the 28th of September, 1891, under which the legislature would have no right to make or authorize such a contract.

In 1892, five years after the making of this contract between the appellee and the State of Kentucky, the legislature passed an act entitled "Revenue and Taxation," which provided, among other things, that each bank should pay what is designated a franchise tax, which, in brief, provided as a mode of taxation the taking of the entire value of its capital stock, surplus, etc., and deducting therefrom the assessed value of its tangible property, the difference being the value of its franchise. The effect of these subsequent constitutional and statutory enactments being to repeal the act of 1886, the Hewitt law, under which the contract was made between the State of Kentucky and the banks, and to thereby subject them and their shareholders to local taxation. In pursuance of this legislation, the appellee's stock and its shares of stock were so assessed for the year 1893 for taxation by the defendant, City of Covington, it being denominated a franchise tax. The appellee insisting that the contract it entered into with the State of Kentucky in June, 1887, under and in pursuance of the Hewitt law of the previous year, was an *irrevocable contract*, and that its shares of stock and all of its property, other than its banking building, were *exempt* from any taxation by the City of Covington until the 17th of November, 1904, the termination of its corporate existence, upon its, the appellee's, compliance with the terms of its contract; and the City of Covington contending that the contract no longer existed, and that the shares of stock and property were subject to taxation by it

for municipal purposes, and that it had a right to collect and exact taxes from it for that purpose, and had the right to collect the taxes imposed for the year 1893, called franchise tax, threatened to distrain the property of appellee therefor. Thereupon the appellee filed in the Kenton Circuit Court its petition in equity against the City of Covington, the appellant herein, the parties to that action being: *The First National Bank of Covington, Kentucky, Plaintiff*, v. *The City of Covington, Defendant*, the said Kenton Circuit Court being a court of full and complete jurisdiction in the premises, both of the parties and of the subject-matter; and the appellee set up in that action the provisions of the act of 1886, the Hewitt law, and the making of its contract with the State of Kentucky thereunder, of its compliance therewith, the subsequent attempted repeal of that law, and *assailed that attempted repeal* upon the *ground* that it was *an impairment of the obligations of the contract* made and entered into by it and the State of Kentucky, asserting and claiming that under that contract its shares of stock, and all of its property, other than its banking building, were exempt during its corporate existence from any taxation by the appellant, City of Covington, and that the city was contending that there was no such contract, but that the same had been repealed, and that shares of stock in appellee and its other property were subject to taxation by it for municipal purposes, and appellee, the bank, by reason of said contract exemption, prayed an injunction against the City of Covington, enjoining and restraining it from collecting or attempting to collect said taxes for the year 1893. Summons was regularly issued, and served upon the appellant, City of Covington, so that it was duly before the said court. At this juncture the judge of the Kenton Circuit Court declined to sit in the said cause by reason of his personal interest in the result, and by agreement of the parties the case was transferred to the Campbell Circuit Court, at Newport, Kentucky, being a court of like jurisdiction with the Kenton Circuit Court. The city appeared and demurred to the petition. Its demurrer was overruled. The facts being correctly set forth in the petition therein, it declined to an-

swer, and thereupon the Campbell Circuit Court adjudged that the contract entered into by and between the appellee and the State of Kentucky, exempting its shares of stock from any local taxation whatsoever, was irrevocable during the corporate existence of appellee, and granted the injunction prayed for. Thereupon the City of Covington prayed and prosecuted an appeal to the Court of Appeals of Kentucky, the court of last resort in that state, from the judgment of the Campbell Circuit Court adjudging such irrevocable contract.

The Court of Appeals on that appeal and in that case specifically and unequivocally adjudged the existence and irrevocability of the contract, and that by reason thereof all the property—other than its banking building—of the bank, appellee here, and its shares of capital stock, were exempt from taxation by the City of Covington, appellant here, during the corporate existence of the bank, until, to wit, November 17, 1904. The bank continued to comply with its adjudged contract.

On March 21, 1900, the legislature of Kentucky passed "An act relating to the taxation of the shares of stock of national banks." (Record, pp. 9, 10.)

This act undertook to authorize the assessment, for both state and municipal purposes, of the shares of stock of national banks, for any year or years since 1892, and to *make the bank liable for the tax.*

The capital stock of this bank, the appellee, during the years 1893, 1894, 1895, 1896, and up to the first day of July, 1897, was $600,000, and upon that day it was decreased from six hundred to three hundred thousand dollars, and the appellee paid to the then shareholders $300,000 in money. During the period from 1893 to the institution of this action, many of the shares of appellee's stock had changed ownership, many being transferred, in many instances holders and owners of its shares had died, and the stock had been distributed among heirs and devisees, and frequently sold to pay debts of the decedent, and many of its shareholders during said period were non-residents of Kentucky, some of whom sold and transferred their stock, and in some cases its

shareholders became insolvent and the stock was sold to pay debts. (Record, p. 31.)

In May, 1900, appellant, Middendorf, assessor of the City of Covington, demanded of the appellee that it list with him for taxation by said city, for all the years from 1893 to 1900, both inclusive, all the shares of its capital stock, and in response, appellee's board of directors adopted a resolution directing its president and cashier not to make such list or report, for the reason that such shares were not subject to taxation by the city, and that it had theretofore been so adjudged. (Exhibit "C," Record, p. 27.) Then the assessor served on the president of appellee a written notice that he list with him said shares for such taxation, for all of said years (Exhibit "D," Record, p. 27.), and because appellee refused to so list said shares of stock, appellants threatened, and were about to have arrested and punished by fine, and compel by process of contempt from the Police Court of said city, appellee's president and cashier to list said shares as aforesaid; this power to so proceed being claimed by appellants under the law governing cities of the second class in Kentucky, and especially sec. 3179, Kentucky Statutes. (Record, p. 11.)

While the act of the legislature attempting to authorize this assessment, for municipal purposes, of the shares of national banks, was passed March 21, 1900, *yet in July following*, it being the time provided for payment in appellee's contract, the State of Kentucky collected from, and still retains, taxes as provided by the contract. (Record, p. 5.)

These facts having been fully set out by the original and amended bill, a complete transcript of the former action between this appellee and the appellant, the City of Covington, having been exhibited therewith, the court granted to appellee an injunction *pendente lite* (Record, p. 58), enjoining appellants from assessing said shares for any time prior to March 21, 1900, and from collecting any tax for any time subsequent thereto until further orders of court. Appellants, as stated, stood upon their demurrer, which was overruled, and refused to answer, and the court granting a perpetual injunction as to assessment or collection of any taxes by City

of Covington on any of said shares prior to March 21, 1900, and permitting the assessment but forbidding the collection of any tax for any time subsequent to that date until further orders of the court, and adjudging appellee its costs (Record, pp. 60, 61), appellants excepted to the judgment, and were granted an appeal to this court.

ARGUMENT.

I.

The Circuit Court had jurisdiction to hear and determine the case presented.

City Railway Co. v. *Citizens' St. R. R. Co.*, 166 U. S. 557;

Bank of Kentucky v. *Stone*, 88 Fed. Rep. 383;

Kembal v. *City of Cedar Rapids*, 99 Fed. Rep. 130;

Southern Railway Co. v. *North Carolina Corp. Com.*, 97 Fed. Rep. 513;

Act of Congress, August 13, 1888, Supplement to Revised Statutes of United States, p. 611;

Sec. 5219 Revised Statutes of United States;

Stone v. *Farmers' Bank of Kentucky*, 174 U. S. 409;

And series of bank tax cases from Kentucky decided by U. S. Supreme Court, Spring Term, 1899, reported in 174 U. S.

Hills, Receiver, v. *National Bank*, 105 U. S. 319.

II.

Under the contract between the appellee and the Commonwealth of Kentucky, it, the appellee bank, and its shares of stock are not subject to taxation by the City of Covington until November 17, 1904; and it having been adjudged in a suit between said City of Covington and the appellee bank that such contract existed, and that the bank and its shares of stock were exempt from taxation by said city until November 17, 1904, the appellant, City of Covington, and its officers are estopped to deny the existence of said contract or said exemption.

That appellee bank and its shares of stock are exempt from taxation by the City of Covington is *res judicata.*

Brownsville v. *Loague*, 129 U. S. 493;
Jeter v. *Hewitt*, 63 U. S., 22 How. 352;
Forsyth v. *Hammond*, 166 U. S. 517;
Cromwell v. *Sac County*, 94 U. S. 351;
Moran Lumber Co. v. *Butchell*, 101 U. S. 638;
Storet v. *Lye*, 103 U. S. 66;
Nesbit v. *Riverside Ind. Dist.*, 144 U. S. 610;
Johnson Co. v. *Wharton*, 152 U. S. 252;
Last Chance Mining Co. v. *Tyler Min. Co.*, 157 U. S. 683;
City of New Orleans v. *Citizens' Bank of Louisiana*, 167 U. S. 371;
Tioga Railroad v. *Blossburg Railroad*, 20 Wall. 142;
Southern Min. Co. v. *St. Paul Co.*, 55 Fed. Rep. 695;
Wilson's Ex'r v. *Dean*, 121 U. S. 529;
Bissell v. *Township of Spring Valley, Cherokee Co., Kan.*, 124 U. S. 225;
Stone v. *Bank of Kentucky*, 174 U. S.;
Stone v. *Farmers' Bank of Kentucky*, 174 U. S. 409;
City of Louisville v. *Louisville Banking Co.*, 174 U. S.;
Thompson, Judge, etc., v. *Louisville Banking Co.*; *Same* v. *Third National Bank of Louisville*, 21 Ky. Law Rep. 1611;
Hardwicke, etc., v. *Young*, 22 Ky. Law Rep. 1906.
Arnold v. *Commonwealth*, 23 Ky. Law Rep. 182.
Davis v. *McCorkle*, 14 Bush, 754.
City of Covington v. *First National Bank of Covington, Ky.*, 97 Ky. 590.

III.

The act of March 21, 1900, impairs the obligation of a contract, undertakes to take the property of appellee and its shareholders without due process of law and without just compensation, and denies to it the equal protection of the laws, and is repugnant to the laws of the United States, and

is retroactive and violative of rights acquired under the law, as held and declared to be.

Constitution of the United States, Art. I, Sec. X;

Amendments to Constitution of the United States, Arts. V and XIV;

Revised Statutes of the United States, Sec. 5219;

Franklin County Court v. *L. & N. R. Co.*, 84 Ky. 59.

JURISDICTION.

I.

There can be no serious question that the bill, as amended, presented a cause of action cognizable in equity, and proper for the courts of the United States to consider and determine.

> "A claim by a corporation in good faith that it has a contract with the city, which the latter has attempted to impair by a grant to another coporation, is sufficient to give jurisdiction to a Circuit Court of the United States of a suit to enjoin the latter corporation from interfering with the rights of the former, although both parties are corporations and citizens of the same state." *City Railway Co.* v. *Citizens' Street Railroad Company*, 166 U. S. 557.

The appellee here is asserting and claiming most confidently, and with the best of good faith, that it has a contract which exempts the shares of its capital stock from taxation by the City of Covington during its, the appellee's, corporate existence, to wit, until November 17, 1904, provided it continues to comply with the conditions of that contract, and it is admitted that it has done so up to the present; also, that the City of Covington cannot deny the existence or effect of such contract.

It is proper in this connection to say that while it has been held by the courts that contracts of other banks *similar* unto appellee's were revocable, and had been revoked, *it has never been decided that* appellee's contract was not in full force. Appellee was not a party to any contract with any other bank. Its was and is a separate contract between it and the State of Kentucky. Appellee was neither a party nor privy to any cause or decision wherein it has been held

that such contracts were revocable, and it has the right to and is now insisting that its contract is in full force and effect, and it is admitted in this case that it has fully complied with every provision of that contract up to the present, and it is contending, that such contract is now in full force, is *res judicata* as to appellants, and appellants are estopped to deny the existence of the contract under which appellee is entitled to the exemption claimed. Appellee is entitled to have decided the question as to the existence of this contract, as well as the other questions, and if it be in existence, then confessedly the act of the Kentucky legislature of March 21, 1900, is an impairment of the obligations of that contract, in violation of the Constitution of the United States.

In *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383, the Circuit Court, Mr. Justice Harlan and Judges Taft and Lurton sitting, it was contended by Stone that the matter there presented, being *the same as one* of the causes made by the bill in the case at bar, was not of equitable jurisdiction in the courts of the United States, but the court, after full consideration, held that a case for determination in equity by that court was presented. That and several other cases growing out of and involving contracts made by banks with the state under the "Hewitt law," decided by the Circuit Court at the same time, were appealed to and decided by this court in the spring of 1899, and are reported in 174 U. S., and were all decided on their merits here, the court taking jurisdiction. (The cases will be cited in another part of this brief.)

In *Southern Railway Co.* v. *North Carolina Corp. Commission, etc.*, 97 Fed. Rep. 513, it was held:

> "A suit by a railroad company to restrain the authorities of a state from collecting a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and intended to impose on railroad property an undue share of the burdens of state taxation, is one which involves the construction and application of the pro-

visions of the Constitution of the United States prohibiting the taking of property without due process of law, and securing to all persons the equal protection of the laws, of which a federal court has jurisdiction, without regard to the citizenship of the parties."

In *Smyth* v. *Ames*, 169 U. S. 466, Mr. Justice Harlan delivering the opinion, it was held that if a case

> "in its essence be one cognizable in equity, the plaintiff (the required value being in dispute) may invoke the equity powers of the proper Circuit Court of the United States, whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction."

In the case at bar it is admitted that the amount of taxes for any one year, if appellant had the right to assess appellee's stock, would be much more than $2,000, exclusive of interest, penalties or cost.

The arrest of the president and cashier of appellee, which it is admitted was to be done by appellants unless they listed the shares of stock in appellee for taxation by appellant, would most assuredly cause the bank, its business and its shareholders most serious injury and damage, for which there was no adequate remedy at law. Appellants claimed the right to so have arrested, fined and proceeded against by process of contempt in the police court of appellant, under the general law governing cities of the second class in Kentucky, and especially provisions of Sec. 3179 Kentucky Statutes, providing:

> ". . . If any person refuse to attend when summoned, or to be sworn to answer, or to answer any question propounded to him by the assessor or his deputy, the assessor or deputy may, in writing, under oath, state the question, the refusal to answer it, and ask the police judge to issue a warrant against such person; and if the question appear to be a proper one, the said judge shall issue a warrant, and the said person shall, on conviction of having refused to answer the question, it being found by the court to be a proper one, be fined ten dollars, and there compelled

by process of contempt to answer the question and such proper questions as the assessor may propound to him. The assessor shall assess personal property in a separate book, in which he shall separate tangible from intangible property. The word person as used herein shall mean natural and artificial persons, and the duties enjoined on them shall, in the case of artificial persons, be performed by the chief officer or agent in the city at the time."

In addition, the act of March 21, 1900, under which appellants were proposing and are claiming the right to assess these shares of stock, is in violation of section 5219 of the Revised Statutes of the United States, and the jurisdictional amount being involved, it is a case arising under both the Constitution and laws of the United States, and by act of congress of August 13, 1888, the Circuit Court of the United States had original cognizance thereof concurrent with the state court. That act of March 21, 1900, would deprive appellee and its shareholders of its and their property without due process of law, deprive them of the equal protection of the laws; would take their property without just compensation in violation of the Constitution of the United States. The statutes of Kentucky *do not* provide, as appellants in their brief claim, for the recovery of illegal taxes paid under protest or compulsion, and they in no way provide a remedy at law for the protection of appellee's rights if it is allowed the city to assess these taxes. The cases decided by the Kentucky Court of Appeals, cited by appellants, do not sustain their position.

It is respectfully submitted that there can be no doubt of the jurisdiction of the Circuit Court to grant the injunctions in this cause applied for by appellee.

II.

Under the contract between appellee and the Commonwealth of Kentucky, it, the appellee bank, and its shares of stock, are not subject to taxation by the City of Covington before November 17, 1904; *and it having been adjudged in a suit between said City of Covington and the appellee bank that such contract existed, and the bank and its shares of stock were exempt from taxation by said city until November* 17, 1904, *appellant, City of Covington, and its officers are estopped to deny the existence of said contract or exemption.*

That appellee bank and its shares of stock are exempt from taxation by the City of Covington is res judicata.

Appellee filed with its bill herein as Exhibit "B" (Record, page 15) a complete transcript of the record from the Campbell Circuit Court in the case of appellee, The First National Bank of Covington, Ky., plaintiff, against the City of Covington, defendant (appellant), this being the case begun in the Kenton Circuit Court on November, 27, 1893, and transferred to the Campbell Circuit Court; and it filed with its amended bill of complaint, as Exhibit "X" (Record, page 33), a complete transcript of the orders, proceedings, judgment and mandate of the Court of Appeals of Kentucky in said cause, it being there on appeal as the *City of Covington, Appellant,* v. *The First National Bank of Covington, Ky., Appellee.*

The bank set out in full in its petition in that case the passage of the Hewitt law in 1886, and its provisions, its acceptance by the stockholders, and its notice to the Governor of its acceptance, and of the making of a contract by and between it and the Commonwealth of Kentucky, and its continued compliance with all the requirements of that contract, and the passage by the Legislature of Kentucky on November 11, 1892, of an act, in effect, repealing the Hewitt,

law, under which the contract was made, and providing for a different taxation of banks from that provided for in the Hewitt law, and the effect of which would be to subject the shares of stock in and property of the appellee here, plaintiff there, to taxation by the City of Covington, defendant there, and appellant here. Having shown that under the act of November 11, 1892, the City of Covington was claiming there was due and owing to it by the appellee $14.892.43 as tax for year 1893 on its franchise, the bank having paid its tax on its real estate to the city for that year, and threatening to distrain the property of the bank therefor, it in that petition claimed and alleged:

> "Plaintiff says that said act of the General Assembly of the Commonwealth of Kentucky of November 11, 1892, and all the other laws of the State of Kentucky which attempts to subject this plaintiff or its property to a different mode of taxation than that prescribed in said act of May 17, 1886, and *in said contract*, made and entered into by and between the said State of Kentucky and the plaintiff under and in accordance with said act of May 17, 1886, which contract has been faithfully kept and complied with by this plaintiff, or which in any way subjects this plaintiff or any of its property, other than its real estate and building, to taxation by the defendant, or authorizes or empowers the defendant to subject this plaintiff or any of its property other than its said real estate and building to the payment of any tax to the said defendant, the City of Covington, are an attempt on the part of the State of Kentucky to violate and impair the obligation of the contract entered into by and between said state and this plaintiff, as aforesaid, and are in violation of section ten of article one of the Constitution of the United States, prohibiting any state from passing any law impairing the obligation of contracts, and are in violation of section twenty, article thirteen, of the constitution of Kentucky in force when said act of May 17, 1886, was passed and

said contract was made, and of section nineteen of the present constitution of the State of Kentucky, which was in force when said act of November 11, 1892, was passed, and are therefore void." (Record, pp. 20–21.)

As stated, the Campbell Circuit Court upheld the contract as contended for by the bank, and perpetually enjoined the city from collecting the tax. (Record, p. 26.)

The case was heard and decided by the Court of Appeals of Kentucky with the cases of sixteen other banks, all going up on separate records from separate courts, *some* being *state* banks and *some national* banks, there being only one other from the Campbell Circuit Court, and in some instances the trial courts having adjudged an irrevocable contract, and in some in favor of the validity of the repeal, all being cases where the respective banks claimed to have entered into irrevocable contracts with the State of Kentucky under the "Hewitt act."

The Court of Appeals of Kentucky, on the 1st day of June, 1895, delivered its judgment and opinion on the appeal by the City of Covington from the judgment of the Campbell Circuit Court, affirming the judgment of the Campbell Circuit Court, the said opinion applying to the seventeen separate cases heard together. The Court of Appeals specifically, fully and clearly held, decided and adjudged that the contract entered into by and between the appellee and the appellant, City of Covington, was *an irrevocable contract during the corporate existence of appellee*, and that by reason thereof the shares of stock of this appellee were exempt from taxation by the appellant, City of Covington, during the corporate existence of appellee, and that neither the shares of stock, nor any of the property of appellee, other than its banking building, were liable for taxation by appellant, City of Covington, during the corporate existence of appellee. The opinion and judgment of the Court of Appeals of Kentucky, delivered through Chief Justice Pryor, is reported in 97 Kentucky, pages 599 to 620. (Record, pages 34 to 47.) The judgment and holding by the Court of Ap-

peals of Kentucky in that case between appellee and appellant, City of Covington, *has never been, in any way, modified or reversed, or set aside, or appealed from.* It was, and is, final and conclusive between the parties. The *specific thing heard, investigated, considered, decided and adjudged* by the Court of Appeals of Kentucky *was, and is, that the shares of stock of appellee*, bank, and all of its property, other than its banking building, *were exempt during its corporate existence from any taxation by the appellant*, City of Covington. There was and is nothing else whatsoever decided by the Court of Appeals of Kentucky in that case. There has been no other case in any court anywhere to which this bank was, in any way, directly or indirectly, a *party*, or to which it was in any way a *privy*, that in any way involved this question. The Court of Appeals, in its opinion in that case, reviewed the history of the legislation in Kentucky upon the subject of the taxation of banks and banking capital, the provisions of the former constitution of Kentucky, the present constitution established in 1891, the act of the legislature of 1892, which it was contended repealed the contract made under the Hewitt act of 1886, and reviewed very fully the provisions of the Hewitt act, which it stated in full at page 603, and the prior decisions by that court, and the arguments *pro and con* in favor of the repeal, and the authorities cited to sustain the various propositions, and at page 608 stated the matter in this way:

> "The question then arises: Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature, or the framers of the constitution, to disregard *this contract* between the banks and the state?" (Record, bottom page 39.)

The court gave the reasons that operated upon the banks and the state respectively. The court, at pages 619, 620, held that:

> "The banks have all practically accepted the provisions of the Hewitt bill, and the legislation repealing or canceling the contract, being in violation of both the state and federal constitutions, leaves the Hewitt bill as to the banks in full force, and they

must be taxed under its provisions *until the contract terminates.*" (Record, page 46.)

Since and before this decision, the appellee has regularly each year, including the year 1900, paid the taxes as by said contract provided to the State of Kentucky, and the said state has received and held all the taxes so paid. During all the years that each share of appellee's stock of one hundred dollars, par value, has been paying to the state yearly seventy-five cents in tax, the regular rate of taxation imposed by the state has been only from $47\frac{1}{2}$ to $52\frac{1}{2}$ cents yearly. (Record, page 5.)

RES JUDICATA.

Literally, *res judicata* means things decided; in practice, a legal or equitable issue which has been decided by a court of competent jurisdiction. It is a general principle that such decision is binding and conclusive upon all other courts of concurrent power. This principle pervades not only our own but all other systems of jurisprudence, and has become a rule of universal law *founded on the soundest policy*. It is perfectly immaterial, to constitute *res judicata*, whether the decision or judgment was right or wrong. An erroneous judgment of a court, having jurisdiction both of the parties and of the subject-matter, is as binding and conclusive in every way as though the judgment had been right. To ascertain whether there is *res judicata*, the court will not, cannot, investigate or determine whether the judgment was right or wrong. It will only see whether the court had jurisdiction, and then ascertain what was actually decided. In other words, what was the thing decided. And it having been decided by a court of competent jurisdiction, no court will, in any other proceeding, review the correctness of the decision. The rule is: A decision makes white black; black, white; the crooked, straight; the straight, crooked. Chief-Justice Fuller, speaking for the Supreme Court in *Brownsville* v. *Loague*, 129 U. S. 493, says:

> "*Res judicata* may render straight that which is crooked, and black that which is white, *Facit ex curvo rectum, ex albo nigrum.*" *Jeter* v. *Hewitt*, 63 U. S., 22 How. 352.

The judgment of the Campbell Circuit Court and decision of the Court of Appeals of Kentucky were an adjudication that all the facts alleged in the petition were true, and it was a holding, final and conclusive, of all the mixed questions of fact and law, and of the questions of law, presented in favor of the bank, and in holding that there was such contract as claimed, and that such contract was irrevocable, the court necessarily held that the parties to the contract, to wit, State of Kentucky and the First National Bank of

Covington, Ky., the appellee herein, had the power to enter into that contract, that it was in no way *ultra vires*, that there was such agreement, that there was a good and sufficient consideration, and that the object and purposes of the contract when made were in all respects legal, valid and binding upon both parties to it. This is the necessary and logical result of the holding. If any fact to the contrary at that time existed or now exists, or if the court erred in its finding upon either the questions of fact, or mixed questions of fact and law, or upon the questions of law, the City of Covington is conclusively estopped to in any way so assert.

In *Forsyth* v. *Hammond*, 166 U. S. 517, a case where the eminent counsel on the respective sides are a guaranty that every possible argument was presented, and where we find this state of case presented: An effort was made in the State Court of Indiana to annex certain territory to the town of Hammond. In the proceedings taken to effectuate this purpose, Forsyth appeared to resist, and a judgment having been rendered annexing her land, she appealed to the Supreme Court of Indiana, where judgment was affirmed. Pending her appeal she filed her bill in the Circuit Court of the United States to enjoin the City of Hammond from annexing the territory. The bill was dismissed. The Circuit Court of Appeals reversed this judgment and directed a decree be entered enjoining the annexation. A *certiorari* was taken to the Supreme Court of the United States, where the judgment of the Circuit Court was affirmed and that of the Circuit Court of Appeals reversed. In passing upon the question of *res judicata*, Mr. Justice Brewer said:

> "She having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities

is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." *Cromwell* v. *Sac County*, 94 U. S. 351; *Mason Lumber Co.* v. *Butchel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent Dist.*, 144 U. S. 610; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.* v. *Tyler Min. Co.*, 157 U. S. 683.

In *City of New Orleans* v. *Citizens' Bank of Louisiana*, 167 U. S. 371, this question was unequivocally decided as appellee contends. I beg to present the review of that decision by the Circuit Court of the United States in *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 394. The court said:

"The second question in the case is that raised by the averment of former adjudication. The case of the *City of New Orleans* v. *Citizens' Bank of Louisiana*, 167 U. S. 371, 17 Sup. Ct. 905, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' Bank in New Orleans was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted, and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the District Court of New Orleans to enjoin the collection of a tax against it, on the ground that it had, by legislative contract, exemption from the same. The District Court sustained the claim and enjoined the collection of the tax. A second suit brought to enjoin another year's taxes resulted in a similar judgment. Some years later the City of New Orleans having attempted to collect a tax for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the Circuit Court of the United States for the Eastern District of Louisiana, to enjoin the officers of the state and the city from proceeding to collect the tax, and set forth the former adjudica-

tion as a conclusive estoppel upon the defendants as to the point of previous litigation, namely, that there was a contract between the state and the bank forbidding such taxation. The causes of action were not the same in the case brought in the federal court and the cases adjudged in the state courts, because they involved taxes for different years; but the thing adjudged, to-wit, the existence and binding effect of the contract for the exemption for the particular taxation was the same. The Supreme Court of the United States in this case held that the City of New Orleans and the state taxing authorities were conclusively estopped by the judgments in the state courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation, and held that the contract having been thus established the bank was entitled to relief from a violation of that contract by any acts of the state officials acting under the authority of state legislation. It had theretofore been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a state or any agency of the state for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court in a most elaborate opinion, said:

"'The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-

books, and enforced by many decisions of this court. . . . It follows then that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.'"

In *Tioga Railroad* v. *Blossburg Railroad*, 20 Wallace, 142, it appears that the one railroad sued the other upon a contract of lease. There was a dispute as to the proper construction of this contract. The Supreme Court of New York construing the contract gave judgment according to that construction. A subsequent suit was brought for other sums due on the same contract, and again the question of its proper construction was raised. This time the suit was in the Circuit Court of the United States, and the plaintiff having again recovered judgment, the case was carried to the Supreme Court of the United States. Mr. Justice Bradley, delivering the opinion of the court, said:

"Some attempt has been made to show that in the suit brought in January, 1855, in the Supreme Court of New York, by the Blossburg Company against the Tioga Company on the contract now in question, the matter of the difference for which the present suit is brought was not a question decided; but we have looked at the record and proceedings therein, which were in evidence in this case, and are satisfied that it was decided. The report of the case in 1 Keyes, 486, shows that it was the only question before the Court of Appeals, to which court the case was carried. The point then is *res judicata* between the parties. It cannot be litigated again on the same contract."

In *Southern Minnesota Co.* v. *St. Paul Co.*, 55 Federal Reporter, 695, Judge Thayer, delivering the opinion for the Circuit Court of Appeals for the Eighth Circuit, says:

"The doctrine is well established that when an issue of fact, or a mixed question of law and fact, on which

> the decision of a case depends, has been tried and determined, the parties to such trial will be estopped, even in a second suit in a different cause of action, where the same issue or question arises, from contending to the contrary of what was thus found and determined. . . . The authorities furthermore show that the estoppel arising from a finding in previous suit between the same parties, is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

A leading case upon this question, and one which is cited very often, is that of *Cromwell* v. *County of Sac*, 95 U. S. 352. The Supreme Court, speaking through Mr. Justice Field, is there considering the difference between the plea of *res judicata* where the suit is between the same parties on the same cause of action and on a different cause of action. We make the following extract from the opinion:

> "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined in the original action, not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action."

These principles have been frequently applied by the Supreme Court and by the Circuit Courts and Circuit Courts of Appeals of the United States, as well as by the Supreme Courts of the various states, especially that of the State of Kentucky. Thus, in *Lumber Co.* v. *Buchtel*, 101 U. S. 638, there was an action upon a guaranty which contracted for

the payment of purchase-money in installments. To a suit for the first installment, the defendant, the guarantor, pleaded that it was induced to make the contract of guaranty by fraud; nevertheless, judgment was recovered. To the second action it set up the same defense, and also that a representation was made to it which amounted to a warranty. The court held that as to the first defense there could be no doubt that the first judgment was conclusive. That as to the second, the same is true, because in looking into the record the court ascertained that the findings of the referee upon which the first judgment was rendered showed that no representation at all had been made by the plaintiff to the defendant, and this finding having gone into the judgment was conclusive as to the facts found in all subsequent controversies between the parties to the contract.

The case of *Wilson's Ex'r* v. *Deen*, 121 U. S. 529, presents the converse to this case, and again the former judgment is held binding.

The case of *Nesbitt* v. *Riverside District*, 144 U. S. 619, presents the converse of the case of *Cromwell* v. *County of Sac*, and is decided by applying the same principle.

In *Johnson Co.* v. *Wharton*, 152 U. S. 256, the court applied the same principles, although the judgment in the first case was for so small amount that the Supreme Court had been without jurisdiction to hear it on the writ of error. The circumstance was held to make no difference.

The City of Covington did not answer in the case in the Campbell Circuit Court, but relied upon its demurrer to the petition. An inspection of the petition in that case will show that the terms of the contract are fully set forth in it. The court specifically held that there was such irrevocable contract between the plaintiff therein and the State of Kentucky, during this complainant's corporate existence. That being specifically held, and the court having granted the relief sought upon the specific ground of an irrevocable contract, the City of Covington is conclusively estopped from claiming that there is not such irrevocable contract.

In *Bissell* v. *Township of Spring Valley, Cherokee County, Kansas*, 124 U. S. 225, it was held:

"That a judgment rendered upon demurrer is equally as conclusive by way of estoppel of the facts confessed by the demurrer as a verdict finding the same facts would have been; and facts thus established can never afterwards be contested between the same parties or those in privity with them."

I do not quote extensively in this brief from the decision of the Court of Appeals of Kentucky, as the court will read it, but the court is bound to and will, under the law as adjudged, look into this record to ascertain for itself whether *in fact* the construction, the validity and the sanctity of the contract between the appellee and the State of Kentucky was litigated in that suit between the parties to this record, and in so looking it will ascertain that the Court of Appeals held that the matter in issue and decided was the effect of the Hewitt law and of compliance therewith by the bank herein; of its scope and true meaning, and of the protection it afforded to appellee and other banks in that litigation against taxation under the act of November 11, 1892, or any other constitutional or statutory enactment which, during the corporate existence of appellee, should endeavor to impose a local tax or a different mode or greater rate of taxation upon the litigating banks or shares of stock than was imposed by the terms of the contract made between the state and the banks under the authority of the Hewitt law.

It *was in no way whatsoever decided* that the appellee was exempt from, and entitled to, the injunction restraining the collection of the taxes claimed by the City of Covington in the year 1893, because it was a franchise tax. The attempted collection of that tax was the cause of the litigation; the defense of the bank and the thing adjudged was that the tax was illegal, not because it was a franchise tax upon a national bank, but that appellee had a contract which exempted it and its shares of stock from any taxation by the City of Covington. That was averred. That was the thing asked. That was the thing disputed. That was the thing heard. That was the thing considered. That was the thing

decided, fully, completely, and forever and finally, between this bank and the City of Covington.

The tax was not assailed because of any informality or defect in its assessment, or lack of power of the city to distrain. The decision of the Court of Appeals of Kentucky was in no way as to the *kind* or *character of the tax*, but was whether the shares of appellee's capital stock and property, other than its banking building, were, *under the contract*, *exempt* from taxation by the City of Covington during the corporate existence of appellee, the existence of the contract, whether the contract had been, or could be revoked without the consent of the bank, and after the city had its day in court, and a full hearing upon the question, the Court of Appeals of Kentucky decided that the appellee had such *irrevocable contract*. An examination of the synopsis of the arguments made by the respective counsel in the Court of Appeals, and published with the opinion, 97 Ky. 581 to 599, shows that the question *argued* to the court was as to the existence and irrevocability of the contract, granting exemption from municipal taxation.

The case in no way turned, or was decided, upon any illegality of the particular tax, but was whether the City of Covington could impose or collect *any* tax on the shares of stock or other property of the bank, other than its real estate, until after November 17, 1904. It might be illustrated by a proceeding to quash the levy of an execution, or to stop the sale of property under such levy. That could well be done without in any way attacking the validity or integrity of the judgment upon which the execution issued; for instance, the property might be exempt, or the levy irregular, but the effect would be only to release as to *that* levy, the execution could then be levied on other property, or a new *fi. fa.* might be sued out on the judgment. If, however, the attack on the levy was based upon the *invalidity* of the judgment and was sustained, the court holding that the judgment upon which the execution issued was invalid or void, then not only could there *be no other* levy of the *fi. fa.*, but *no new* one could be sued out. And so in the case at bar, the Court of Appeals of Kentucky did not hear, try or

decide as to any informality or illegality of the particular tax, but did as to the contract, which by its terms inhibited appellant from imposing any tax on these shares before November 17, 1904.

That the decision of the Court of Appeals of Kentucky, known as the Judge Pryor decision, rendered the first day of June, 1895, was and is *res judicata* of the question of the contract and of its irrevocability, as to all parties to that litigation, has been held by the Circuit Court of the United States for the district of Kentucky and by the Supreme Court of the United States.

The personnel of the Court of Appeals of Kentucky having changed somewhat, that court, on the 25th of March, 1897, in *another series* of bank cases presented to it wherein a *similar* question was involved as that in the Judge Pryor decision in 1895, *supra*, reached a different conclusion as to the revocability of the contract entered into under the Hewitt act. But this appellee was in no way a party to that later decision, nor was the appellant a party to that decision; and because the Court of Appeals decided a similar question differently from what it decided it in the litigation between these parties, in no way whatever affects the *res judicata* or thing decided in the controversy between the parties to this record. The Court of Appeals having rendered this later decision (known as the Judge Paynter decision), the question of the revocability of the contract and also as to the *res judicata* was presented to, considered and determined by the Circuit Court, composed of Justice Harlan and Circuit Judges Taft and Lurton, in the series of cases reported in 88 Federal Reporter, at pages 383, etc. The Circuit Court, in an elaborate opinion in case of *Bank of Kentucky* v. *Stone*, 88 Federal Reporter, 383, the complainant therein, Bank of Kentucky, being one of the banks, parties to the suits heard and decided by the Court of Appeals in June, 1895 (Pryor decision), held that such decision of the Court of Appeals of Kentucky, holding that there was such irrevocable contract, was and is *res judicata*, and that the parties to that litigation were estopped to assert that there was not such irrevocable contract. While the United States

Circuit Court held that the contract was not irrevocable and was a repealable one, and necessarily, therefore, that the Court of Appeals of Kentucky had decided the case erroneously, nevertheless it having been so decided it was binding and conclusive in all forums in all cases, and the parties to the record were estopped to deny the irrevocability of the contract, which the Court of Appeals of Kentucky had adjudged. Stone appealed from this decision to this court, and on the 15th of May, 1899, this court affirmed the decision of that court holding the *res judicata*. *Stone* v. *Bank of Kentucky*, 174 U. S. In the case of the *Northern Bank* v. *Stone*, 88 Federal Reporter, 413, the Circuit Court held that the decision of the Court of Appeals was *res judicata* as to Bourbon county, which was a party to the previous litigation, but was not *res judicata* as to the cities of Covington and Lexington, because they were not parties to the litigation wherein it was adjudged that there was this irrevocable contract, although that bank had branches in both cities. This case did not go the Supreme Court.

In *Farmers' Bank of Kentucky* v. *Stone*, 88 Federal Reporter, 987, the Circuit Court held that the Farmers' Bank in the prior litigation with the county of Franklin and cities of Frankfort and Henderson was conclusively adjudged to have an irrevocable contract under the Hewitt act exempting it from any taxation in excess of that provided therein. (This was the Chief-Justice Pryor decision in 97 Ky.) There was no such adjudication, however, between the Farmers' Bank and either Scott county or Henderson county, where it had branches, and their demurrers to the bill were sustained, and the bill dismissed as to them, while as to the other defendants the demurrers were overruled and the injunction granted. There we have a holding by the Circuit Court that all those who were parties to the Judge Pryor decision could never afterward question the existence of an irrevocable contract, which was *res judicata*, and acted as an estoppel as to them forever, and as to those counties, to wit, Scott and Henderson, that were not parties to that adjudication, the question was not *res judicata*, and the bank was bound to pay local taxes in those counties. The case came to the

Supreme Court of the United States, and was affirmed by this court in whole and in part, the court holding that the decree, so far as it granted relief against the defendants other than the county of Scott and city of Georgetown, should be affirmed upon the sole ground of *res judicata*. The court said that the city of Georgetown and county of Scott not having been parties or privies to the judgment pleaded as *res judicata*, it must be affirmed. *Stone* v. *Farmers' Bank of Kentucky*, 174 U. S. 409. This case clearly and conclusively illustrates the correctness of appellee's contention herein, that *res judicata* depends in no way upon the correctness of the decision. The decision establishing the irrevocable contract was wrong, but notwithstanding that fact, it is binding and conclusive upon all municipalities that were parties to that decision, and is not in any way binding or conclusive upon the municipalities that were not parties, although it was the same bank.

In the case of the *Louisville Banking Co.* v. *City of Louisville*, 88 Federal Reporter, 988, the court held that the decision of the Court of Appeals of Kentucky in 1895 was *res judicata*, and that judgment was affirmed by the Supreme Court of the United States. *City of Louisville* v. *Louis. Banking Co.*, 174 U. S.

These were all state banks that were parties to the decision of the Court of Appeals of Kentucky in 97 Ky., in the year 1895, and in each and every instance the Supreme Court affirmed the holding of the Circuit Court that that decision constituted *res judicata*, although it was the opinion of the court that the decision holding that there was an irrevocable contract was *wrong*.

In the case of the Third National Bank of Louisville, which was also one of the series of cases wherein the Court of Appeals of Kentucky held that there was such irrevocable contract, the Circuit Court held, 88 Federal Reporter, 990, that the question as to the existence of an irrevocable contract was *res judicata*, and, on appeal, this court affirmed the judgment of the court below, saying, 174 U. S. 435:

> "We need not, however, consider the question of *res judicata*, upon which the court below based its con-

clusion, as we have, in case No. 404, just announced, held entirely without reference to the plea of *res judicata* that taxes in form exactly like those here in question were illegal because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders. It follows, therefore, that the decree below which restrained the collection of the taxes was correct, and it is therefore affirmed."

That is, this court found that the judgment of the Circuit Court was right upon a ground other than the *res judicata*, and did not find it necessary to consider the question of *res judicata* in that case. In *every instance* where this court considered the effect of the Judge Pryor decision in 1895, it held that the question of an irrevocable contract was *res judicata* as to *the parties to that record*. The Court of Appeals of Kentucky having subsequently held that there was not an irrevocable contract under the Hewitt law, that it was repealable, and the Circuit Court of the United States having taken the same view, and the Supreme Court so holding, it follows of necessity that in the *State Bank* cases, in which a franchise tax would not be illegal, the Bank of Kentucky, the Farmers' Bank and others, that the Supreme Court of the United States would not have affirmed the judgment save and alone upon the ground of *res judicata*.

The Circuit Court, in deciding the case at bar, did not pass on the question of *res judicata*, nor as to whether the appellant is by the former decision estopped to deny the exemption of appellee's shares of stock from municipal taxation, deciding the case upon the other grounds which will be taken up later in this brief. Upon the question of *res judicata*, the court said (Record, p. 55):

"In this particular case, however, the views so far expressed may all become subordinate to the question most energetically urged, that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the state to the effect that its shares shall only be taxed according to the provisions of the Hewitt

law, and that this matter has been finally adjudicated by the courts of the state in the manner stated in the bill.

"The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties or those in privity with them is certainly broad enough, as usually stated, to cover cases like this if there are no exceptions to it. The case of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, goes far towards closing the question, and will do so unless its operation should be limited by considerations now to be stated. Of course, as to the claim for taxes for the year named in the suit described in the bill of complaint, the judgment is absolutely conclusive, although in the light of later decisions palpably erroneous. Should its effect be limited to the taxes for the year named in that suit, under the circumstances about to be stated, is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law and the complainant's acceptance of its provisions constituted an irrevocable agreement between the bank and the State of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893 and only enjoined their collection."

Reciting that the Court of Appeals of Kentucky in a later decision sustained the revocability of these contracts, and that this court in *Citizens' Saving Bank* v. *Owensboro*, 173 U. S. 636, had in the fullest manner sustained the last view taken by the Court of Appeals of Kentucky, the learned judge said (Record, pp. 56, 57):

"It is possible that it was with a purpose and desire to consider this phase of the question when it should come up that the Supreme Court, in the *Owensboro case*, 173 U. S., at page 648, so explicitly withheld an expression of its opinion as to whether the principle of *res judicata* would apply to the suits

for taxes claimed for future years in a case where there had been such a judgment as is here pleaded.

"It may be that the authorities, which are very strong, will not permit even such an exception to be grafted upon the general rule, and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of *New Orleans* v. *Citizens' Bank*, 167 U. S., for this court to leave it to a higher tribunal to say whether there should be any limitations upon the general rule as to the conclusive effect of judgments as between the parties to the litigation; but, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration."

No question of *res judicata* was, or could have been, considered in the *Owensboro case*, 172 U. S., *supra*, for no such question was in that case. That bank accepted the provisions of the "Hewitt act," and made the contract, but it was neither a party nor privy to the bank tax cases in 97 Ky., *supra*, where the irrevocability of the contracts was upheld, and there was no decision by any court that the bank had an irrevocable contract. It brought its action in the state Circuit Court alleging its contract, that Circuit Court decided adversely to it, and upon appeal to the Court of Appeals of Kentucky, that court held that the contract had been repealed, this being one of the banks parties in the Judge Paynter decision, 102 Ky. 174, decided March 24, 1897, so that no possible question of *res judicata* could or did arise in that case in this court, and it *being a state bank, it was subject to the franchise tax*, the matter then involved. What this court *decided* in that case was at page 655:

"Our conclusion being that there was no irrevocable contract protecting the bank from taxation, and, therefore, that the taxing law of Kentucky did not violate the contract clause of the Constitution of the United States, it follows that the decree below must be, and it is, affirmed."

This court, at page 648, did say:

> "It is not pretended that the bank, whose rights are here contested, was either a party or privy to the *Bank Tax Cases*. And even if such were the case, we must not be understood as intimating that the construction of the Hewitt act, which was announced in the *Bank Tax Cases*, would be binding in controversies as to other taxes between those who were parties or privies to those cases. On this subject we expressly abstain from now intimating an opinion. In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment."

This was nothing more than making it plain that the court was not intimating an opinion on a question that was not before it in that case, especially as at the time other cases were pending before the court wherein the question was to be decided. That case was decided on April 3, 1899, and on the following 15th May, in case of *Farmers' Bank* v. *Stone*, 174 U. S. 410, *supra*, it was held by a divided court that the Pryor decision in bank tax cases, 97 Ky., *was binding* as to other taxes, on those who were parties or privies to that case, and such was the holding of the series of cases decided by this court and above referred to. In *no instance* did this court hold that as to those who were parties to that decision it was not *res judicata* as to taxes for other years, and in every instance held, it is true by a divided court, that the municipalities, parties to that decision, were estopped to deny that their adversary bank therein had a contract under which it and its shares of stock were exempt for future years from such municipal taxation.

The Legislature of Kentucky recognized that there was a complete estoppel by reason of the judgment as to the banks that were parties to the decision of the Court of Appeals of Kentucky in 1895 (Judge Pryor), and upon March 22, 1900, passed an act, being Chapter 28, Session Acts 1900 (page 88), as follows:

AN ACT TO REPEAL CERTAIN STATE BANK CHARTERS.

"*Whereas*, by virtue of a recent decision of the Supreme Court of the United States, all banks of this state, both state and national, are now required to pay state and local taxes in Kentucky, except the Bank of Kentucky, the Farmers' Bank of Kentucky, and the Deposit Bank of Frankfort, which three last named banks, by virtue of said decision, are now claiming exemption from all state and local taxes, except as provided in the Hewitt law, during their corporate existence; therefore,

"Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky:* That an act, entitled 'An act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof, also an act entitled 'An act to incorporate the Farmers' Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof, also an act entitled 'An act to incorporate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby, repealed. Provided, That if said banks, or either of them, on or before May first, nineteen hundred, file in Secretary of State's office their or its written consent to pay taxes under state and local levies of nineteen hundred and subsequent years, as provided in the constitution and revenue statutes of this state, the bank or banks thus agreeing shall be excepted from the operation of this act.

"Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed.

"Sec. 3. *Whereas*, it is important that all banks of this state should be placed upon the same footing as to taxation without delay, an emergency exists, and this act shall take effect and be in force from and after its passage."

This was a distinct recognition by the legislature of Kentucky, in view of the decisions by this court, that the banks who were parties to the Court of Appeals decision in the bank tax cases, 97 Ky., were protected by reason of their contracts from any local taxation during their corporate existence, and that the question of such contract exemption was *res judicata*. By this act the legislature proceeded to repeal the charters of such state banks, providing that such repeal should not take effect as to such banks as would, by May 1 (following), 1900, file their *written* consent to "pay taxes under *state and local levies*."

The Court of Appeals of Kentucky quite recently has passed upon the effect of its decision, June 1, 1895, in the bank tax cases (Pryor decision), and in a way to leave no doubt that it holds it to be absolutely binding upon all the parties to it.

In *Thompson, Judge, etc.*, v. *Louisville Banking Co.*, and *Same* v. *Third National Bank of Louisville*, decided March 17, 1900, 21 Ky. Law Rep. 1611, Judge Hobson, delivering the opinion of the court, said:

> "These two appeals, involving the same question, have been heard together. On May 4, 1894, appellees filed in the court below their petition ordinary, alleging in substance that by virtue of the Hewitt act they were exempt from municipal taxation; that appellant as judge of the city court was about to proceed to fine them for not complying with a city ordinance, requiring them to pay municipal taxes; that the ordinance was void and that the judge of the city court had no authority to enforce it. They prayed a writ of prohibition prohibiting him from proceeding further in the matter. Appellant demurred to the petition, and on June 19, 1894, the demurrer was sustained on the ground that it did not set forth a cause of action, and appellees failing to plead further, the actions were dismissed. From this judgment they prayed and prosecuted an appeal to this court. On June 1, 1895, the judgment of the court below was reversed by this court and the cases remanded for

further proceedings consistent with the opinion. On April 13, 1897, the mandate and opinion were filed in the lower court, and thereupon a judgment was entered overruling the demurrer to the petition, and the appellant declining to plead further, on motion of the appellees, it was adjudged that the prayer of the petition be granted and appellant prohibited from proceeding further with the prosecution referred to. From this judgment appellant has prosecuted these appeals. The grounds of reversal relied on by the learned counsel for the city are as follows:

"*First.* Prior to the rendition of the judgments appealed from, on April 13, 1897, by the court below, this court had in certain other actions, on March 24, 1897, overruled its former decision in these cases.

"*Second.* Section 163 of the act for the government of cities of the first class, under which these actions were brought, is unconstitutional and void.

"*Third.* The Louisville city court had jurisdiction of the subject-matter independently of the ordinance referred to, and if the ordinance was unconstitutional the remedy was by appeal and not by writ of prohibition.

"None of these grounds seem to us available. The *opinion rendered in these cases is the law of the cases, however erroneous it may have been.* The fact that it was overruled in a subsequent case between other parties destroys it as a precedent in other cases; but it is nevertheless binding on the parties to this controversy. *The rule is elementary that a matter once litigated and determined finally cannot be relitigated between the same parties.* When these cases were returned to the court below that court had no alternative but to obey the mandate of this court, and upon appeal from that judgment this court is as much bound by that mandate as the court below was. If this were not so litigation would be interminable, and a judgment of this court finally settling the rights of the parties would be only the starting point for new

litigation. (*Legrand* v. *Baker*, 6 Monroe, 243; *Copely* v. *Copely*, 2 Ky. Law Rep. 437; *Lewis* v. *Lewis*, 9 Ky. Law Rep. 413.)

"If the statute under which the actions were brought was unconstitutional, or if prohibition was not the proper remedy, the petition stated no cause of action, and the demurrer thereto was properly sustained. *The judgment of this court holding the petitions good necessarily concluded both these matters.* It is *immaterial whether they were argued on that appeal or considered by the court.* They were necessarily involved and the rule is well settled that the plea of *res adjudicata* applies not only to the points which the court actually decided, but to every point that was presented by the record and necessarily involved in the decision of the case. (*Davis* v. *McCorkill*, 14 Bush, 746; *Williams* v. *Rogers*, 14 Bush, 781; *Smith* v. *Branin*, 79 Ky. 119; *Francis* v. *Wood*, 81 Ky. 16.)

"Judgment affirmed."

In this case the Court of Appeals followed what has long been the universal rule in Kentucky as to prior decisions.

In *Davis, etc.*, v. *McCorkle*, 14 Bush (Ky.), at page 754, the court held:

"The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

And in *Williams* v. *Rogers*, 14 Bush, at page 781, the court said:

"As this matter was necessarily passed upon on the first appeal, although not adverted to in the opinion, appellant is precluded from again raising the question."

Also, in the case of *Francis* v. *Wood*, 81 Ky., at page 22, the court said:

"The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward."

As a case wherein this doctrine of *res judicata*, and estoppel that grows out of it, is fully reviewed and authorities thereon collected, I beg to present the very recent case of *Hardwicke, etc.*, v. *Young*, decided by the Court of Appeals of Kentucky, April 16, 1901, 22 Ky. Law Rep. 1906. For convenience, the full opinion is quoted, and is:

"OPINION OF COURT BY JUDGE DU RELLE.

"The appellee brought a suit against appellants to restrain the collection of school taxes for District No. 50, of Nicholas county, upon the alleged ground that his property was not taxable in that district, but in District No. 28, of Bourbon county. On appeal to this court, it was decided, in an opinion by Judge Paynter (20 Ky. Law Rep. 1191), that a judgment in his favor should be reversed and his petition dismissed.

"Appellee thereupon brought another suit against the trustees to enjoin the collection of the same taxes, the ground alleged being that the law under which the taxes were imposed was in violation of section 157 of the constitution, for want of the assent of two-thirds of the voters of the district, voting at an election for the purpose. The trustees pleaded the former judgment in bar of the action, and a demurrer to the answer was sustained.

"Appellee admits that the relief sought in the former suit is identical with that sought in this, but insists that the only fact involved or litigated in the former case was, whether appellee's residence was in one district or the other, and that the validity of the tax levy and the constitutionality of the act under

which it was made were not directly or indirectly involved in the former suit. His contention is, that there are two causes of action, either of which would entitle him to the relief which was sought—one, that his property was not in the tax district; the other, that the law under which the tax was levied was unconstitutional.

"If his contention is correct, it is evident that he might litigate in a separate suit every individual ground of objection to the tax. And so we might have a succession of litigations to determine the constitutionality of the act, the situation of the property to be taxed, the validity of the tax levy, exemptions from taxation under exceptions in the act, and matters in avoidance, such as payment or compromise. What is the cause of action in this proceeding? When a collection of tax is sought to be enjoined, it is manifest that the usual procedure is reversed, the party who, in ordinary proceedings, would be plaintiff, asserting his right, becoming defendant, and the party who, in ordinary proceedings, would be a defendant, relying upon his defense, becoming the plaintiff. In such a proceeding the matter relied upon in the petition is defensive. In this proceeding it is matter which is supposed to be defensive to a liability to taxation. The matter which is litigated is liability to taxation. The object of the litigation was not to determine where his property was situated, but to determine the question that it was not liable to the tax. If we go the other way about to ascertain what was the controversy, the case is freed from much of its difficulty. If this had been a tax suit authorized by law for the recovery of the tax, there can be no question that the defendant would be required to set up all available matters of defense, or be barred from asserting them in any future proceeding. There is no question here of matters which may be called *quasi* defensive, such as set-off and counterclaim, upon which the authorties are not altogether in harmony.

"In section 349 of Freeman on Judgments, cited by appellee, it is said: 'An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.'

"In *Cromwell* v. *County of Sac*, 94 U. S. 351, also cited by appellee, Judge Field, discussing the doctrine of *res judicata*, said: 'In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. . . .'

"So, in *Bean* v. *Meguiar, Helm & Co.*, 20 Ky. Law Rep. 886, it was said: 'The opinion upon the former appeal is decisive of the rights of the parties to this appeal upon all questions involving the validity of that judgment, as on a second appeal the court will not go behind the first decision and decide a question which was or could have been raised on the first appeal, unless the question were one that was expressly left open for future litigation.' (*Hapworth* v. *Thomp-*

son, 3 Ky. Law Rep. 254; *Burns* v. *Stephenson*, 3 Ky. Law Rep. 754.)

"In *Burnett* v. *Commonwealth*, 21 Ky. Law Rep. 695, this court said: 'The rule is well settled that a judgment is conclusive, not only as to all matters which are in fact litigated, but also as to all others which the parties might have presented, and should have been presented, and that a litigant cannot present part of his cause of action, and if beaten on that, rely on the balance.'

"So, in *Francis* v. *Wood*, 81 Ky. 22, it was said: 'The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward. They cannot open the litigation in respect of matters which might have been brought forward, only because, by negligence or inadvertence, they have omitted from their case.'

"And in *Davis* v. *McCorkle*, 14 Bush, 746, it was said: 'A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction.'

"In Bigelow on Estoppel (5th edition, page 86), after stating the general doctrine of *res judicata* with reference to the effect of a former judgment *in personam*, it is said: 'It will be seen that the fact that the form of action and precise remedy sought are different in the two suits will not prevent the existence of an estoppel. The estoppel grows out of matter of substance, and form has little, if anything, to do with it. This is believed to be true at the present time even in regard to matters of pleadings, according to more widely prevailing modes. After what has been said, it need hardly be added that, where the court had jurisdiction and the judgment was not

"concocted" in fraud, it is entirely conclusive upon the parties, and cannot be impeached in any collateral action either because, *e. g.*, the law was incorrectly applied to the case, or because some statute under which the proceedings were taken, as, *e. g.*, an insolvency statute, was unconstitutional, or because the facts before the court were incorrectly found, or because the facts were not all known at the time.'

"A number of cases are cited in support of this doctrine. In all of them the doctrine laid down in the text is recognized, though in some of them the courts refuse to apply the doctrine, because citizens of one state were held not to have become parties to insolvency proceedings under the laws of another state in the absence of citation or appearance. In *Folger* v. *Clark*, 80 Me. 240, a creditor whose debt accrued before the passage of the insolvent law, having proved his debt against the estate and received dividends, sought to recover the balance of the debt on the ground that the law, as to his claim, was unconstitutional. The question was whether he was estopped by these facts from asserting such unconstitutionality. It was held that he was estopped. Said the court: 'In *Lee* v. *Tillotson*, 24 Wend. 337, it was held that a party having waived a constitutional provision cannot subsequently ask for its protection. "A contrary argument," says Cowen, "would deprive a criminal of the power to plead guilty, on the ground that the constitution has secured him a trial by jury." In *Daniels* v. *Tearney*, 102 U. S. 426, the court says: 'It is well settled as a general proposition, subject to exceptions, that when a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense.' The case at bar is stronger than that. It is a case of judicial estoppel, or an estoppel by judicial proceedings. Mr. Cooley after enumerating the classes of cases where for different causes the insolvent law is not allowed to apply, says:

'if, however, the creditor in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the constitution from the reach of the law' (Cool. Con. Lim. (5th edition) 358; Whar. Conf. Laws, section 528).

"Again, on page 152, Mr. Bigelow says: 'A judgment is conclusive by way of estoppel of facts (necessary facts in a chain as well as the primary facts in issue), and none other, without the existence and proof or admission of which it could not have been rendered. The judgment determines all questions that ought to have been presented.'

"After a careful examination of the authorities we have reached the conclusion that the subject-matter of the litigation was appellee's liability to the tax. He undertook, in a proceeding to restrain its collection, to set up his defense against the claim. It was his duty to assert all matters which were strictly defensive. Having failed to do so, he cannot now, in a subsequent suit, be allowed to assert defenses which he neglected or overlooked in the former litigation. He cannot cut and come again. There must be somewhere an end to the litigation of liabilities which have been judicially determined.

"For the reasons given the judgment is reversed, with directions to dismiss appellee's petition."

This opinion was followed in a few days, on April 17, 1901, by another by the Court of Appeals of Kentucky in *Arnold* v. *Commonwealth*, 23 Ky. Law Rep., page 182, in which the court, through Judge Hobson, held:

"This is the second appeal of this case. The facts of the case are fully stated in the opinion rendered on the former appeal (*Arnold* v. *Commonwealth*, 21 Ky. Law Rep. 1566). On the return of the case to the lower court another trial was had, resulting in a verdict and judgment convicting the appellant of murder, and fixing his punishment at confinement in

the penitentiary for life. It is earnestly insisted by his learned counsel that the indictment is insufficient and that the demurrer to it should have been sustained. It is too late to make this objection, which was passed by on the first appeal. The opinion then delivered is conclusive of all matters actually decided or presented by the record, and which should have been decided. The court on that appeal reversed the judgment for error in the instructions given to the jury and remanded the case for a new trial. This was in effect to hold the indictment good (*Thompson* v. *First National Bank*, 21 Ky. Law Rep. 1611, and cases cited)."

From these decisions by the Court of Appeals of Kentucky, it is manifest that counsel for appellant have misread the cases which they cite from that court, as indicating a different rule as to estoppel by *res judicata*, from that contended for by appellee in this cause. A brief review of the authorities cited by appellant will so show.

In *City of Newport* v. *Masonic Temple Association*, 103 Ky. 592, decided May, 1898, the facts were: The association was chartered by the legislature of Kentucky on March 29, 1880, and the charter contained a provision: "That all property of said company devoted to Masonic or charitable purposes shall be exempt from all taxation." There was nothing whatsoever in the charter preventing a subsequent legislature from amending or repealing it. That charter was held by the court to be in every respect subject to what is known in Kentucky as the act of 1856, as follows:

> "That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed; provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It appeared that the association had a portion of its building rented for $1,700.00 per annum. There was no

question that this charter exemption was good under the constitution in force in Kentucky at the time of its passage. The new constitution took effect September 28, 1891. In 1892, the City of Newport sued the Masonic Temple Association for taxes on its four-story brick building for years 1887, 1888, 1889, 1890 and first half of year 1891. The company pleaded its charter exemption, which was in force during the time of these claimed taxes, and was not repealed until September, 1891, by the adoption of the new constitution. The court sustained a demurrer to the petition and dismissed it, holding the charter exemption good for those years. Subsequently the city sued for taxes for 1891, 1892 and 1893, and the Masonic Temple Association pleaded the former decision as *res judicata*, and this is the case that appellant cites as authority. The Court of Appeals held that there was no question of *res judicata*, as the first decision was merely that the existing *charter exempted* the association from tax, while the case there presented was for taxes after the charter exemption had *confessedly* been repealed, and there was and could be no question as to the right to repeal. The Court of Appeals said:

> "If we should hold that the judgment in the former case was a bar to a recovery in this case, we would in effect hold that neither the legislature nor a constitutional convention could alter or amend a law or charter, because a court had adjudged the rights of the parties thereunder. If we did this, then we would be holding that a question was adjudged which *was not in issue in the former case, and one that could not have been raised in it.* In the former case, the matter for adjudication arose under the provisions of the charter, and the question for adjudication in this case arises under the amended and altered charter."

In the *City of Newport, etc.*, v. *Commonwealth*, 21 Ky. Law Rep. 42, there was no question whatsoever of contract or exemption by charter. In that case, the decision relied on as constituting *res judicata*, there had been no controverted *fact* or *issue* ascertained or adjudged. The thing decided by the

court in that case was, that in a subsequent case the court was not bound by its decision of law in a former case.

In *Louisville Bridge Co.* v. *City of Louisville*, 22 Ky. Law Rep. 703, a former decision "based largely, and in fact almost entirely, upon the idea that appellant's (bridge company's) property was situated beyond the population of the city, and enjoyed neither actual nor presumed benefits from its municipal government, and it was exempted from taxation upon the same theory that agricultural lands situated within the corporate limits of municipalities were exempted in the case of *Southgate* v. *City of Covington*," was held not to be *res judicata*, when conditions had altogether changed, and the new constitution had prescribed a new rule of taxation. And the court held that the bridge company was exempt from taxation by the City of Louisville until the adoption of the constitution in 1891, not upon any ground of *res judicata*, as there could be no such question in that case, but the court would follow its former rule of construction and apply it to the years preceding the specific requirement of the constitution.

Appellant's counsel are altogether mistaken in citing *South Ottowa* v. *Perkins*, 94 U. S. 247, as an authority in support of their position. In that case, this court neither considered nor decided a question in any way similar to that presented in the case at bar. The proposition argued in that case was: Although an act was not duly passed by the legislature of Illinois, the town, having issued bonds under the act, was estopped from denying its passage. This court, speaking through Mr. Justice Bradley, held:

> "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow;

> a law in one place and not a law in another in the same state. And whether it be a law or not a law is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise."

In *Owensboro National Bank* v. *Owensboro*, 173 U. S. 665, *it was not decided*, nor can any such inference be drawn from that decision, that the contract under the Hewitt act was either illegal or void as to national banks, or as to them *ultra vires*. Such has never been decided by any court. That is not now a question for investigation, but if it was the court would not decide the contract to be *ultra vires*. Under that act the shares of stock were taxed while *what* this court held in the Owenboro case to be *invalid* was a *franchise* tax.

Applying the rule as laid down by the textwriters, held by this court and the Court of Appeals of Kentucky, as well as other courts of last resort, it is most earnestly submitted the question as to the exemption of the shares of stock in appellee, during its corporate existence or until November 17, 1904, from taxation by the City of Covington, was presented in the suit between it and the City of Covington, was fully argued to, considered and decided by the Court of Appeals of Kentucky in favor of such exemption; and the question has ever since been, and now is, *res judicata*, and the City of Covington, the party to that suit, is conclusively estopped to contend otherwise.

III.

The act of March 21, 1900, impairs the obligation of a contract, undertakes to take the property of appellee and its shareholders without due process of law and without just compensation, and denies to it the equal protection of the laws, is repugnant to the laws of the United States, and is retroactive and violative of rights acquired under the law, as held and declared to be.

Act of March 21, 1900, *invalid.*

The act of March 21, 1900, is clearly illegal and void, in that it is retroactive, and it is an attempted discrimination against the appellee and other national banks located in the State of Kentucky.

Section 2 of that act provides for the listing by the president or cashier of the bank of its shares of stock, and then provides that *the bank* shall *be* and *remain liable* to the state, county, city, town and district for the taxes upon said shares of stock.

Section 3 provides that when the shares of stock in national banks have not been listed for taxation under levy or levies of any year or years since the adoption of the revenue law of 1892, that these shares of stock shall be listed for taxation under said levy or levies; and then undertakes to provide that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years; and also where any national bank has paid for any of these years state taxes under the Hewitt law in excess of the state taxes required by this act for the same year or years, the bank shall be entitled to credit by said excess upon the state taxes required by this act.

Here we have an attempt to make the *bank liable* for

taxes upon its shares of stock for *the preceding seven years.* And, as it appears in the case at bar, where the stock has changed hands repeatedly, and where the capital stock of complainant was $600,000 up to the 1st day of July, 1897, since which time it has been only $300,000; that is, the capital stock of the bank was reduced one-half at that time. But, notwithstanding this, the proposition is that the city shall go back and collect from the bank taxes upon its shares of stock that are not, and have not been, in existence since the 1st day July, 1897, although there was paid to the state every year seventy-five cents upon each of its shares of stock. The protection proposed by the act being that the bank shall receive a credit from the state for the taxes that it has paid heretofore. What protection is this? The bank might discontinue this year or next year. Indeed, in the case of this bank, it having a capital stock now of only $300,000, and having paid for five years on $600,000 under the Hewitt law, and since then paid regularly upon $300,000, the excess that it has so paid would be more revenue than the state would be entitled to receive from it at the present rate of state taxation, during the balance of the corporate existence of the bank.

It is shown (Record, page 5) that the rate of taxation by the state, beginning with 1886, has at no time been greater than 52½ cents on the $100, and during several years only 42½ cents. Here is the excess the bank has paid:

Year.	*Rate.*	*Excess.*	*Capital Stock.*	*Amt. Excess.*
1893	47½	27½	$600,000	$1,650 00
1894	42½	32½	600,000	1,950 00
1895	42½	32½	600,000	1,950 00
1896	42½	32½	600,000	1,950 00
1897	52½	22½	600,000	1,350 00
1898	52½	22½	300,000	675 00
1899	52½	22½	300,000	675 00
1900	47½	27½	300,000	825 00
				$11,025 00

That is, the bank has paid to the state during the years 1893 to 1900 the sum of $11,025.00 in excess of what it would have had to pay, paying the rate that property generally paid during those years, and the act proposes to give to the bank credit for this excess on future payments. Even if the bank continues to exist until the end fixed in its charter, November, 1904, the tax going to the state at the present rate of 47½ would be only about *one-half* of this sum.

The act is retroactive. The state has taxed this bank, under the contract, almost double what was the rate as to property generally, has received its taxes from the bank, held it, and still holds it, and, as the bill shows, collected its tax under the contract for the year 1900, after the adoption of this act of March 21, 1900 (it has also collected it for the year 1901), showing conclusively that the state itself recognizes that, so far as this appellee is concerned, it is not in any way subject to this act. Yet, it is proposed under the authority of the state to exact local taxes upon the shares of stock of the appellee for years that have elapsed, as well as for those that are to come, during its corporate existence.

A tax upon the shares of stock is not a tax against the bank. Should the bank fail to pay and become insolvent, then the state, or the municipality wherein the bank is located, may pursue the stockholder into another state, and in another jurisdiction collect from the stockholder taxes levied against shares of stock in his name that were not paid by the bank.

According to the general revenue law of Kentucky, state banks are still being assessed on their franchise under the revenue law of 1892, and this is the only mode provided for the assessment of state banks generally.

The legislature, in 1898, by an amendment approved March 19, 1898 (Session Acts, 1898, page 96), conferred upon cities of the first and second class in the State of Kentucky the power to assess the franchise of all banks, state and national, for taxation by said cities. That is, that act conferred upon such cities the power of assessment given by the revenue law of 1892 to the state board of valuation and assessment; and the legislature, b[illegible] act which be-

came a law upon March 23, 1900, without the signature of the governor, amended this act of 1898, by which it has undertaken to provide for the assessment for taxation by cities of the first, second and third classes, of the shares of stock of every incorporated bank, trust company, etc., located in such cities. That is an attempted provision for the assessment of the shares of stock in banks located in any of these three classes of cities, when there is no such provision for the assessment of the shares of stock of any state bank located anywhere in the State of Kentucky, outside of any of these three classes of cities. The declared purpose of this act of March 21, 1900, as appears from the sixth section thereof, was to place national and state banks upon the same footing as nearly as may be consistently with said article 3 of the act of 1892. This does not place national banks upon the same footing as state banks. The way for the legislature to have done so would have been to provide for the assessment of the shares of stock of all state banks in the state, no matter where located, as well as the shares of stock of national banks.

The shares of stock of the bank are to be assessed. Some of the shares of stock of this bank have gone out of existence; in many instances the stock has changed hands. Suppose this assessment should be made for the years 1893 to 1900; it would be against the shares of stock, and the act undertakes to make the bank liable for it. Who would pay the tax? Could it be taken out of the money on hand that belongs to its present stockholders? Is it a burden that follows the stock? Did the persons who bought the stock in the meantime take it *cum onere?* Did they take it with any legal liability attaching that the city might undertake to impose for these seven years. The act makes the bank liable for the tax. If a person who owned stock at any time during these years, and sold it, and has in the meantime become insolvent, from whom and how can the bank reimburse itself? If the owner of stock during any part of this period has disposed of it, and moved to any other jurisdiction, can the bank be made to pay the tax upon his stock and pursue such owner to that jurisdiction, and, after it had done so,

could it enforce the collection of the taxes from him? This presents a condition of affairs for which the appellee bank, nor any of its shareholders, are in any way responsible. It grows out of the act of the State of Kentucky and the decision by its court of last resort.

Under section 5219 of the Revised Statutes of the United states, all the shares in a national bank "may be included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which such association is located."

While a tax may thus be by the authority of the state imposed upon the shares of stock, it is against the shareholders and not against the bank, but the bank may be compelled to pay the tax thus levied on the shares. *First National Bank* v. *Commonwealth*, 9 Wallace, 353. The bank, however, is not absolutely liable for the tax on its shares; to render it liable, it must be shown to have, or have had at the time the tax was due, dividends belonging to the shareholders. *Farmers and Traders' National Bank* v. *Roffman*, 93 Iowa, 191.

It stands admitted that the appellee "*hath* regularly during each and every of said years semiannually paid to its *then* shareholders its current earnings and profits by way of dividends." (Record, p. 31.) That is, it paid the full taxes under the contract each year to the state, and then paid to the shareholders the net earnings by way of dividends.

Upon the 14th of December, 1900, the Court of Appeals of Kentucky, in the case of *Scobee, Sheriff, etc.*, v. *Bean, etc.*, 22 Ky. Law Rep. 1076, for the first time held that, under the general revenue law in Kentucky, shares of stock in national banks were assessable by the county assessor (for state purposes) in the hands of the shareholders, holding:

> "Such shares are subject to taxation in the *hands* of *the owners* under the provisions of sections 4050 and 4058, Kentucky Statutes, under the head of miscellany."

This decision in no way affects the questions here made.

Even if there was no question of *res judicata*, and the act of March 21, 1900, confessedly valid, yet the appellee and its shares of stock could not be assessed for taxation by the City of Covington for any time prior to the passage of that act. The settled law of Kentucky is, as declared by the Court of Appeals of that state in *Franklin County Court* v. *Louisville & Nashville R. R. Co.*, 84 Ky. 59:

> "Where there has been a failure to list property for taxation because of the decision of the court of last resort in the state that such property was not subject to taxation, the fact that the court subsequently decides that the law was misinterpreted will not authorize the collection of taxes on the property for the period during which the law as announced and understood did not require such property to be listed for taxation.
>
> "The Court of Appeals of Kentucky decided in 1868 that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety, and liable in its consolidated character for state revenue only. This case was followed by another to the same effect, and the law remained as declared by the Court of Appeals until 1876. So much of appellee's road as is in Franklin county was not assessed for county taxes for the years 1868 to 1875, inclusive, and the county now seeks to collect taxes thereon for those years. *Held*, that while the court is of opinion that the law was misinterpreted, yet, as appellee complied fully with the existing law, as interpreted by the highest tribunal in the state, no more should be required of it."

The court in that case, at pages 64, 65, said:

> "From 1868 to 1875, inclusive, it was, however, the law, as declared by this court, that the road of the appellee was not taxable for county purposes. There was no express statutory provision to the contrary. Rights were acquired and duties performed in accordance with the then law as announced and understood,

and in the absence of an express statute to the contrary, the then construction of the law must yet be held to be *the* law governing the acquisition of rights, or the performance of duties of that period.

"It is well settled that if a contract be valid under the law as previously expounded by the courts, and as understood at the time, no subsequent judicial action will render it invalid. Parties have the right to and do contract with a view to the then law as declared. (*Olcott* v. *The Supervisors*, 16 Wall. 678.)

"It is equally just that the same rule should apply as to duties required of them, such as the listing of their property for or the payment of taxation. Otherwise, they would not know when or how to act safely as to investment; and it would introduce much uncertainty and mischief into the business of the country. If they comply fully with the existing law, whether it be in *the form of positive legislative enactment or judicial interpretation, no more should be required of them.*"

This case was quoted with approval by the court in *Commonwealth for, etc.*, v. *L. & N. R. R.*, 89 Ky. 139.

Applying the law, as thus declared by the court of last resort in Kentucky, to the facts in the case at bar, there can be no assessment of the shares of appellee's capital stock until after the passage of the act of March 21, ~~1896~~ 1900

The Court of Appeals of Kentucky, in June, 1895, decided appellee not liable for taxation by appellant, and with that knowledge, no act was passed by the legislature until March, 1900. It is true that in 1897 the Court of Appeals held contracts similar to appellee's not to exempt those particular banks, but it could well be said that, as these cases involved questions under the Constitution of the United States, there was no final decision therein until May, 1899, and not *until then* was the decision of June, 1895, by the Court of Appeals of Kentucky, finally overruled, and not until then, when this court had spoken, was it finally determined whether, under the Constitution of the United States, the

contracts made under the Hewitt law in 1886 could be revoked by the state. As so clearly stated by the Court of Appeals in that case, 84 Ky., page 65:

> "Rights were acquired, duties performed in accordance with the *then law as announced and understood*, and in the *absence of an express statute to the contrary*, the *then* construction of the law must yet be held to be *the* law governing the acquisition of rights or the performance of duties of that period."

The record in this case shows the full compliance by appellee with all the requirements of it, as *expressly* held by the Court of Appeals of Kentucky, and it shows the reduction of stock, payment of dividends, sale of shares, etc., during the time when it surely had the right to say that it was in every respect acting entirely within, and in accordance with, the law as declared to be.

The act of March 21, 1900, discriminates against national banks. By its very title, it is confined to national banks, and proposes to go back and tax their shares wherever the bank may be located in the state, when there is nowhere in the law of Kentucky any statute taxing *shares* in state banks, or the state banks themselves wherever located in the state. The attempted assessment and collection of taxes by the appellant upon the shares of stock of the appellee, either for the past years or subsequent ones until the expiration of its contract, November 17, 1904, is an impairment of the obligations of that contract, and a taking of property without due process of law, and a taking of private property for public use without just compensation; and to enforce said act of March 21, 1900, against the appellee herein would be an abridgment of its privileges and immunities, and a denial to it of the equal protection of the laws. It is most respectfully submitted that the judgment appealed from should be affirmed, and that it should be adjudged that the shares of the capital stock of appellee and its property, other than its banking building, are by reason of its contract under the Hewitt act of 1887 exempt from taxation by the City of Covington until November 17, 1904, the bank in the mean-

time complying with the conditions of that contract, and that the City of Covington is estopped by reason of the judgment by the Court of Appeals of Kentucky in its suit with appellee to deny the existence of such contract, and that it is *res judicata*, and that the act of March 21, 1900, is as to appellee void and invalid, and contrary to the statutes of the United States.

Respectfully submitted,

JAMES W. BRYAN,

Solicitor for Appellee.

COVINGTON, KY., *January* 11, 1902.

APPENDIX.

Article II, Chap. 92, General Statutes (Ky.) Ed. 1887, Hewitt Law.

Stocks.

Section 1. That shares of stock in state and national banks, and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, state, county and municipal.(a) For the purpose of ascertainng such surplus, undivided profits or undivided accumulations, the auditor may, at his option, investigate the books of such bank, institution or corporation; and any officer having in charge the affairs of such bank, institution or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the Circuit Court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution or corporation is located, institute an action in any

Auditor may investigate books.

court having civil common law jurisdiction of the amount involved for the recovery of the fine.

Corporations to report and pay tax.

SECTION 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits or undivided accumulations, and how or in what said surplus, undivided profits or undivided accumulations is invested, and to pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent upon the amount, and any state bank, institution or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths: "I —— swear (or affirm) that I am the —— of ——, and that I have in the foregoing report truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulations of said ——, and how or in what said surplus, undivided profits or undivided accumulations is invested."

Affidavit.

Further provision as to banks, etc.

SECTION 3. If any such bank, institution or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits or undivided accumulations than an amount equal to ten per cent of such capital stock, the excess of the amount so invested over the amount equal to ten per cent of such capital stock shall be exempt from taxation for that year and deducted from the amount of surplus, undivided profits,

or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of congress or under the charters of the state banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of the Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank, and its shares of stock, shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

May be exempt from other taxation.

SECTION 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

Banks as to section 4.

SECTION 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the general statutes.

Failure to comply.

SECTION 7. If any bank, state or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of the stock of such bank, institution, or corporation and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, state county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.